No. 14-520

Supreme Court, U.S.
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In The
Supreme Court of the United States

VALERIE J. HAWKINS and
JANICE A. PATTERSON,

Petitioners,

v.

COMMUNITY BANK OF RAYMORE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONERS' REPLY BRIEF

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REASONS FOR GRANTING THE PETITION

I. Congress does not enact meaningless legislation prohibiting discrimination against persons which can never be enforced. An ECOA "applicant" includes corporate entities which have no race, gender, or marital status, making it impossible to discriminate against these corporate entities without considering those persons with whom it is affiliated. The Eighth Circuit's flawed ECOA interpretation concludes that lenders may lawfully deny credit based on the race, gender, marital status, age or religion of individuals owning small corporations without violating the ECOA, opening the floodgates to lender discrimination against closely-held business owners without consequence.

The *Hawkins* concurring opinion trumpeted by CBR leaves the ECOA's discriminatory prohibitions against small corporations meaningless.[1] The *Hawkins* concurrence reasoned that a corporate-borrower qualifies as an ECOA credit "applicant," but not the individuals standing behind the entity. A corporate entity has no race, gender, marital status, age, or religion. Under the concurring *Hawkins* opinion,

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[1] The arguments raised here by CBR are the genre now to be faced by ECOA claimants based upon *Hawkins*' imprecise reasoning.

lenders can deny credit to women-owned or minority-owned small corporations based on gender or race, but the woman or minority owner directly impacted has no ECOA standing; only the borrower-corporation, as "applicant" has ECQA standing. This enables lenders to discriminate against owners based on race, gender, marital status, age, or religion without ECOA violation. Small corporation owners now are subject to the obvious discriminatory pretext that the corporation has no race or gender, and thus cannot be discriminated against. Review is necessary to halt this end run on the ECOA.

A. The *Hawkins* concurrence concludes that only entity-borrowers qualify as "applicants," not individuals.

The *Hawkins* concurrence concludes that the ECOA unambiguously defines "applicant" as "the single person to whom credit would be extended, not a third party asking on behalf of the putative debtor." *Hawkins v. Cmty. Bank of Raymore*, 761 F.3d 937, 943 (8th Cir. 2014) (Colloton, C.J., concurring). According to the concurring *Hawkins* opinion, the ECOA "specifically envisions the involvement of a third party who requests an extension of credit to a first-party applicant, but distinguishes between the third party requestor and the 'applicant.'" *Id.* at 944. The *Hawkins* concurrence concludes that the "'applicant' is the party to whom credit will be extended"; therefore, only the corporate borrower qualifies as an ECOA credit applicant. *Id.*

The ECOA, however, prohibits discrimination "against *any* applicant" on the basis of "race, color, religion, national origin, sex or marital status, or age." 15 U.S.C. § 1691(a)(1). The statute's text does not say "against *the* applicant."[2] The ECOA expressly recognizes that a "person" under the definition of "applicant" includes "a corporation trust, estate, partnership, cooperative, or association." 15 U.S.C. § 1691a(f). Who constitutes a "cooperative" or "association"? If condominium owners who are primarily minorities form a non-profit corporation to manage the "association" which is denied credit, is the race-less, non-profit corporation the "putative debtor" and only party with standing? When the race-less, non-profit association brings a claim for ECOA race discrimination, will they not face the specious arguments under the "putative debtor" pretext that a corporation has no race, and therefore cannot assert a claim? Are the actual condominium owners who comprise the non-profit corporation the real parties who have suffered discrimination?

This suspect reasoning highlights the ECOA's inherent ambiguity when a corporation, association, cooperative, or other entity requests credit. If only the entity-borrower can be an "applicant," who possesses the race, gender, marital status, age, or religion of the

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[2] The *Hawkins* concurrence draws support for the use of definite articles, but ignores the omission of definite articles here. *See Hawkins*, 761 F.3d at 943.

entity-borrower? Neither the ECOA nor *Hawkins* answers these critical questions.

B. The *Hawkins* concurring opinion's ECOA interpretation permits lenders to deny credit to closely-held corporations based on the business owner's race, gender, marital status, age, or religion. Such an interpretation renders the ECOA meaningless.

The *Hawkins* concurrence's ECOA interpretation ignores business realities and excludes closely-held business owners from ECOA protection. Small business owners routinely request credit for their closely-held corporate entities, and banks extend loans largely based on collateral pledged and the business owners' guaranties. Lenders deal with individuals who own these small corporations, not the faceless, race-less, genderless entity.

The ECOA makes it unlawful for lenders to "discriminate against *any applicant*." Under the concurring *Hawkins*' reasoning, the entity-borrower is *the sole applicant*. Since the entity-borrower has no race, gender, marital status, or religion, a lender can deny credit to the entity-borrower on prohibited grounds, and the owners standing behind the entity-borrower and directly impacted by the discriminatory conduct have no ECOA protection.

For example, utilizing the Eighth Circuit's reasoning, a lender could deny credit to a minority-owned,

closely-held corporation based on the owner's race without violating the ECOA; the race-neutral corporation is *the only* ECOA credit applicant entitled protection. The rationale is hollow at best because the lender cannot discriminate against a corporate entity which has no race; the minority business owner discriminated against lacks ECOA protections. The statute becomes meaningless.

This Court should not wait for Congress to act. While waiting, countless credit discrimination acts will likely follow *Hawkins*' imprecise conclusions. Review is necessary to preserve the ECOA's protections.

C. Legislatures do not enact meaningless legislation. If the entity-borrower is the sole ECOA "applicant," then the ECOA's protections are meaningless since the entity-borrower has no race, gender, age, or ethnicity.

A presumption exists that legislatures do not enact useless or meaningless legislation. *Corley v. United States*, 556 U.S. 303, 314, 129 S.Ct. 1558, 1566 (2009) ("The Government's reading is thus at odds with one of the most basic interpretive canons, that '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" (internal quotation marks omitted)). Yet, the *Hawkins* concurrence renders much of the ECOA meaningless. If the entity-borrower is the sole ECOA "applicant,"

then the ECOA's protections are meaningless since the entity-borrower has no race, gender, age, or ethnicity and cannot be discriminated against.

Further, the *Hawkins* concurrence runs counter to the ECOA reporting requirements. The reporting requirements mandate that lenders "compile and maintain" information on "women-owned" and "minority-owned" credit applications, including the "race, sex, and ethnicity of the principal owners of the business." 15 U.S.C. § 1691c-2(b) and (e)(2)(G). CBR, however, argues that 15 U.S.C. § 1691c-2(3)'s prohibition on including the "name, specific address . . and telephone number concerning any individual who is, or is connected with, the women-owned, minority-owned" business loan somehow illustrates that the ECOA unambiguously excludes guarantors from protection. *See* Brief in Opposition at 34.

CBR's argument and the *Hawkins* concurrence overlook the obvious: the ECOA expressly requires race and gender information germane to discriminatory conduct by identifying the individual race and gender for persons standing behind the entity-borrower. Contrary to CBR's suggestion, the ECOA's reporting requirements illustrate Congress's recognition that the ECOA's discriminatory prohibition cannot be measured without considering the race, gender, and ethnicity of the individuals "connected with" the entity-borrower. Limiting the ECOA's protections to only the entity-borrower renders the ECOA meaningless.

II. CBR suggests this Court should deny review based on alternative arguments when no decision was ever rendered by the district court or the Eighth Circuit on these issues. CBR's "alternative" grounds consist of attacks on Petitioner Valerie Hawkins for the first time on appeal. CBR claims that Valerie Hawkins "represented" and "waived" matters buried in boiler-plate provisions in her guaranties. CBR's "alternative" grounds have no bearing on this Court's decision to grant review.

CBR argues this Court should deny certiorari because alternative grounds not addressed by lower courts bar Petitioners' recovery. *See* Brief in Opposition at 14-21. CBR cites Justice Thomas's dissent in denying certiorari in *Noriega v. Pastrana*. 559 U.S. 917, 130 S.Ct. 1002, 1009 (2010) (Thomas, J., dissenting). Contrary to CBR's assertion, Justice Thomas did not argue against granting certiorari because the Eleventh Circuit's opinion is sustainable on alternative grounds. *Id.* Justice Thomas advocated *granting* certiorari "no matter what we conclude on the merits" so as to "avoid years of litigation and uncertainty." *Id.* Here, the Court should similarly grant certiorari to avoid years of litigation and uncertainty concerning the ECOA's application to spousal guarantors, and future uncertainty created by the imprecise *Hawkins* ruling.

Yet, CBR claims for the first time on appeal that Valerie Hawkins made "representations" and "waivers"

which preclude ECOA protection. Valerie Hawkins made no such "representations" or "waivers." Rather, CBR inconspicuously buried boiler-plate language in Ms. Hawkins' guaranties, required her to sign, and now claims she made binding representations by citing the boiler-plate language out of context.

A. CBR violated the ECOA by requiring PHC to obtain Valerie Hawkins' guaranties. Valerie Hawkins did not "voluntarily" provide guaranties as CBR suggests.

CBR claims Valerie Hawkins "represented on *sixteen* separate occasions that [her] guaranties were being provided *'at the request of PHC.'*" *See* Brief in Opposition at 14. CBR concludes that Valerie Hawkins "voluntarily" provided her guaranties. *Id.* at 15. Valerie Hawkins' "representations" are boiler-plate provisions CBR buried in a three-page, legal-sized, single-spaced, eight-point font guaranty. The buried, boiler-plate provisions state that Valerie Hawkins executed guaranties "at [PHC]'s request." CBR fails to mention, however, that it *required PHC to obtain Valerie Hawkins' guaranties* as a condition for extending credit. Valerie Hawkins did not "volunteer" her guaranties, rather CBR required her signatures through PHC in violation of 12 C.F.R. § 202.7(d)(1) and (5).

B. CBR understood Valerie Hawkins has no economic interest in PHC. CBR did not rely on boiler-plate guaranty provisions claiming Valerie Hawkins' "substantial economic interest" in PHC.

CBR accuses Valerie Hawkins of "representing" she had a "substantial economic interest in [PHC]" to induce CBR's extension of credit. *See* Brief in Opposition at 16. In reality, CBR inconspicuously buried this boiler-plate language in single-space, non-bolded, eight-point font located only in the first three of sixteen guaranties. CBR understood Valerie Hawkins had no financial interest in PHC. CBR reviewed PHC's Operating Agreement and Articles of Organization which do not reference Valerie Hawkins as PHC's member, officer, or employee. CBR failed to mention any interest claimed by Ms. Hawkins in any loan memoranda in CBR's files. CBR cannot credibly claim reliance on boiler-plate guaranty language suggesting Valerie Hawkins' fictional "economic interest" in PHC. CBR's loan files directly contradict this unsubstantial assertion.

C. Valerie Hawkins did not waive ECOA protections. CBR cites guaranty "waiver" provisions out of context by not including qualifying language which limits their application to defenses for suretyship, impairment of collateral, and setoffs. Valerie Hawkins' ECOA claims and defenses are not based on suretyship or impairment of collateral, and were not waived.

CBR further asserts that Valerie Hawkins knowingly waived ECOA protections stating: "Petitioners waived any defenses given to guarantors at law or in equity other than actual payment and performance of the indebtedness and waived and agreed not to assert 'any claim of setoff, counterclaim, counter demand, recoupment or similar right.'" Brief in Opposition at 20. CBR's license with the waiver language is remarkable. The section contains three divided paragraphs. CBR does not rely on any language from the first paragraph. CBR only quotes one phrase – not a complete sentence – from the second paragraph: "any defenses given to guarantors at law or in equity other than actual payment and performance of the Indebtedness." *See* Brief in Opposition at 20.

CBR fails to mention that this phrase is one of six clauses, (A) through (F) in the second paragraph, which is preceded by the following introductory and qualifying language:

> Guarantor also waives any and all rights or defenses based on suretyship or impairment

> of collateral including, but not limited to, any rights or defenses arising by reason of.

Valerie Hawkins does not claim a right or defense based on suretyship or impairment of collateral. The ECOA has nothing to do with those defenses. CBR's waiver argument is unavailing and misleading.

CBR also suggests the last paragraph of the waiver section applies. Again, CBR brazenly editorializes the language. The qualifying clause sets out that the paragraph applies to any claimed deductions to the amount guaranteed. Valerie Hawkins is not claiming any deductions. Valerie Hawkins claims her guaranties do not exist because they are illegal.

CBR raised the above-described "alternative grounds" for the first time in its Eighth Circuit appellate brief. The Eighth Circuit declined to mention or rule on CBR's "alternative grounds." *See Hawkins*, 761 F.3d at 937-45. CBR asks this Court to refrain from resolving important federal questions dividing the Eighth and Sixth Circuits based on alternative arguments raised for the first time on appeal. This Court should decline CBR's invitation.

III. Disagreement between the Sixth and Eighth Circuits warrants Supreme Court review of whether ECOA "applicants" for "any aspect of a credit transaction" unambiguously excludes spousal guarantors. CBR's Brief in Opposition acknowledges this split and highlights the need for review on this important matter.

CBR recognizes that a circuit split persists between the Sixth and Eighth Circuits. *See* Sup. Ct. R. 10; Brief in Opposition at 21-32. Indeed, CBR spends much of its brief understandably extolling the Eighth Circuit's opinion to advocate its cause while accusing the Sixth Circuit of "manufacturing ambiguity to impose its own view." *See* Brief in Opposition at 21-32. CBR argues the Eighth Circuit correctly denied spousal guarantors standing as ECOA credit "applicants," whereas the Sixth Circuit erred by finding the ECOA's definition of "applicant" "broad enough to capture a guarantor." *Id.* CBR fails to articulate why this Court should allow a clear circuit split to persist.

CBR's criticism of the Sixth Circuit lacks merit. An "applicant" applies for "credit." 15 U.S.C. § 1691a(b). "The term 'credit' means the right granted by a creditor to a debtor" as identified by the Sixth Circuit. *See RL BB Acquisition, LLC v. Bridgemill Commons Development Group, LLC*, 754 F.3d 380, 385 (6th Cir. 2014); 15 U.S.C. § 1691a(d). The ECOA does not define "debtor," but the "overwhelming majority of courts" hold that a "guarantor is a debtor" within the meaning of Article 9 of the Uniform

Commercial Code. *U.S. v. Kelley*, 890 F.2d 220, 223 (10th Cir. 1989) (quoting *In re Kirkland*, 91 B.R. 551, 553 (Bankr. 9th Cir. 1988) and citing additional authority from Alabama, California, Hawaii, Iowa, Massachusetts, Minnesota, Missouri, New York, North Dakota, Pennsylvania, and Vermont).

The "ECOA prohibits discrimination 'with respect to *any aspect* of a credit transaction,' 15 U.S.C. § 1691(a)," and has "broad remedial goals." *RL BB Acquisition*, 754 F.3d at 385 (emphasis in original). Contrary to CBR's suggestion, the Sixth Circuit did not impermissibly conclude that a lender-required, spousal guarantor who is a "debtor" involved "in any aspect of a credit transaction" has standing to bring ECOA claims.

CBR insists there is "nothing exceptional" about the fundamental disagreement between the Sixth and Eighth Circuit, yet accuses the Sixth Circuit of "ignor[ing] basic rules of statutory construction and its prior holding in order to manufacture an ambiguity." *See* Brief in Opposition at 21-22. CBR further accuses the Sixth Circuit of "stretching to find an ambiguity," reaching "illogical conclusions," and eschewing precedent to remake the law to its liking. *Id.* at 29-30. CBR's Eighth Circuit support and Sixth Circuit criticism only highlight the obvious: a clear split exists which requires this Court's review.

Alaska, Iowa, Missouri, and Virginia state supreme court opinions directly conflict with the Eighth Circuit. Each state affords spousal guarantors ECOA

standing. *See Still v. Cunningham*, 94 P.3d 1104 (Alaska 2004); *Bank of the West v. Kline*, 782 N.W.2d 453 (Iowa 2010);[3] *Boone Nat. Sav. & Loan Ass'n v. Crouch*, 47 S.W.3d 371 (Mo. 2001); *Eure v. Jefferson National Bank*, 448 S.E.2d 417 (Va. 1994). CBR recognizes that federal court decisions which interpret federal law do not bind state courts. *See* Brief in Opposition at 37 (citing *Arizonans for Official English v. Arizona*, 520 U.S. 43, 58 n.11, 117 S.Ct. 1055, 1064 n.11 (1997)). Spousal guarantors in Iowa or Missouri are therefore afforded ECOA protection in state courts, but not federal district courts.[4] This Court should grant certiorari to resolve the conflict between the Eighth Circuit and the state supreme courts in Alaska, Iowa, Missouri, and Virginia. *See* Sup. Ct. R. 10(a).

CONCLUSION

For these reasons and those in Petitioners' Petition for Writ of Certiorari, this Court should grant review to reverse the Eighth Circuit Court of Appeals'

[3] The Iowa Supreme Court decided *Kline* in 2010, three years after the Seventh Circuit applied its *Chevron* analysis in *Moran Foods v. Mid-Atlantic Market Development*, 476 F.3d 436 (7th Cir. 2007).

[4] Iowa and Missouri are both in the Eighth Circuit's jurisdiction. Iowa and Missouri federal courts are bound to follow Eighth Circuit law, whereas the state courts are bound to follow state case law. Review is necessary to prevent uneven application of law and forum shopping.

holding that the ECOA's definition of "applicant" unambiguously excludes guarantors. Petitioners also request remand of this proceeding to the District Court for resolution on the merits. Due to the complex statutory and regulatory scheme at issue, Petitioners respectfully request the Court to invite the Solicitor General to file a brief in this case expressing the views of the United States.

Respectfully submitted,

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